DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 97-0264
Gross Income Tax
For The Tax Periods: 1992 through 1995

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ISSUES

I. **Gross Income Tax – Nontaxable/Taxable Out-shipments**

Authority: IC 6-2.1-3-3, IC 26-1-2-401, 45 IAC 1-1-119, 45 IAC 1.1-3-3, Associated Milk Producers, Inc. v. Indiana Department of Revenue, 512 N.E.2d 917 (Ind. Tax 1987), aff'd 534 N.E.2d 715 (1989), Union Electric Co. v. Department of Revenue, 136 Ill.2d 385 (1990), Reynolds Metals Co. v. Indiana Department of State Revenue, 433 N.E.2d 1, 8 (1982 Ind. App.).

The Taxpayer protests the Department's assessment of sales/use tax on the sale of coke to Foreign customers.

STATEMENT OF FACTS

The Taxpayer is an out-of-state corporation. The Taxpayer is in the business of screening and selling coke to Indiana and non-Indiana customers. The Taxpayer receives coke owned by others, screens it and returns it to those customers for further use in the customer's manufacturing operations. The product may be shipped from the screening plant directly to the customer via common carrier truck. Also, The Taxpayer ships via railcars where the terms disclose that the shipment is F.O.B. railcar at the Indiana loading station or F.O.B. delivered. A number of the Taxpayer's customers are foreign companies and the Taxpayer ships coke to these companies by delivering the coke to docks in Indiana to be loaded on ships for ultimate delivery to foreign companies outside the U.S. The Taxpayer is generally listed as the shipper or consignor of the coke on the Bills of Lading and the coke is normally shipped F.O.B. dock in Indiana. More facts will be supplied as necessary.

I. Gross Income Tax: Nontaxable/Taxable Out-shipments

DISCUSSION

Pursuant to IC 6-2.1-3-3: "Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution." Yet, income may be considered taxable if the sale was completed within Indiana. During the audit, the Taxpayer was assessed gross income tax on its sales made to foreign customers when the goods were delivered to rail yards or docks in Indiana and is subsequently loaded onto the ship or railcar where the F.O.B. point is designated in Indiana. The auditor states that these transactions were completed in Indiana and therefore, is subject to Indiana tax. However, the Taxpayer contends that the gross receipts from the sale of coke to Foreign (non-Indiana) customers, where the coke is picked up in Indiana by a common carrier that was instructed to do so by the customer, is not taxable in Indiana under the Gross Income Tax. The Taxpayer argues that the fact that the customers do not receive possession of the coke in Indiana and that it is delivered by a common carrier outside of Indiana is determinative of this issue.

Pursuant to IC 26-1-2-401:

(2) Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place, and in particular despite any reservation of a security interest by the bill of lading;
  (a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but
  (b) if the contract requires delivery at destination, title passes on tender there.

Also, "[t]he party claiming the interstate commerce exemption… bears the burden of establishing such facts, [and] any doubt should be resolved in favor of the tax." Reynolds Metals Co. v. Indiana Department of State Revenue, 433 N.E.2d 1, 8 (1982 Ind. App.) Thus, in order to show that the title to the coke did not pass to the customer within Indiana, the Taxpayer must provide evidence that the sale was not completed in Indiana. 45 IAC 1-1-119 states in part:

> Sales of Goods Originating in Indiana to Persons in Other States. As a general rule, income derived from sales made by Indiana sellers to out-of-state buyers is not subject to gross income tax unless the sales are completed in Indiana. Below is a list of some of the more common outshipment situations with an indication of taxability to each:
>
> (1) Nontaxable outshipments
> …

(f) Sales to nonresidents, where the goods are picked up in Indiana by common carrier which was ordered to do so by the buyer, and delivered to an out-of state destination.

(2) Taxable outshipments

…

(b) Sales to nonresident where the goods are accepted by the buyer or he takes actual delivery within the State. Sales will also be taxable if the goods are shipped out of state on bills of lading showing the seller, buyer or a third party as shipper if the goods were inspected and accepted, or when any other evidence shows that the sales were completed prior to shipment in interstate commerce.

…

(f) Sales to nonresidents where the goods are shipped from a point in Indiana to a point in Indiana.

The Taxpayer contends that it does not make any difference that a F.O.B. dock is used for the agreement, rather, they argue that what is important is whether the delivery will be made by common carrier to a point outside Indiana. Although the Taxpayer concedes the case is not precedent in Indiana, they rely heavily on Union Electric Co. v. Department of Revenue, 136 Ill.2d 385 (1990). In Union Electric, the Illinois Supreme Court dealt with a consolidated appeal concerning whether the purchases of coal from Illinois companies by nonresident power generating facilities are subject to use tax. The coal was shipped by a common carrier railroad to a dock (F.O.B.) in Illinois where it was transferred to a common carrier barge for shipment to the out-of-state utility plants. The court found that the coal was not subject to tax. The Illinois Supreme Court noted that the fact that items sold were designated F.O.B. dock in Illinois was not determinative of a sell when the product was transferred from one common carrier to another at the dock within the state. Nevertheless, the Department must be concerned more with abiding by its own regulations and court cases when dealing with this case.

The Taxpayer distinguishes the present case from Associated Milk Producers, Inc. v. Indiana Department of Revenue, 512 N.E.2d 917 (Ind. Tax 1987) aff'd, 534 N.E. 2d 715 (1989). In Associated Milk Producers, the taxpayer was assessed gross income tax on the income it received for sales of cheese which was loaded onto the customer's trucks in Indiana and then driven to the out-of-state facilities where the customer tested it to make sure it conformed to its needs. The court found that the actual delivery of the goods occurred at the taxpayer's plant in Indiana when the cheese was loaded in the customer's trucks. Here, the Taxpayer points to footnote 2 in which the Indiana Tax Court stated: "[h]ad the taxpayer delivered the cheese to a common carrier at Warsaw, to be shipped by buyer's expense, the transaction would have been exempt under the commerce clause." Id. 919. However, the Indiana Supreme Court stated:

> Assuming *arguendo* that the sales were not local in nature, they are still not necessarily constitutionally exempt from the gross income tax under the Commerce Clause. To this extent, the statement of the court below that mere delivery to a common carrier would make the transaction completely exempt under the Commerce Clause is subject to question.

534 N.E. at 718.

The Taxpayer also contends that if the buyer finds that the coke is contaminated or in violation of the sales agreement, the customer may renegotiate the price of or return the coke. However, the terms and conditions of sale on the Taxpayer's acknowledgement of order states that "[o]rders are not subject to cancellation or suspension after shipments have gone forward from the point of origin." Since what the Taxpayer states conflicts with the documentation previously sent to the Department, the Taxpayer does not clearly show that they did not intend the transfer of the coke to take place at the F.O.B. point. This is reinforced by the fact that sample purchase orders show that the insurance for transport is issued in favor of the customer. If the Taxpayer does not allow the customer to reject or cancel as the purchase order states, then the Taxpayer intended the transaction to be complete within Indiana.

They also state that the coke is not inspected prior to being loaded on the vessel, but rather inspects the material upon its arrival at its destination. However, the Taxpayer states that because coke comes in different grades, a draft survey and certificate of analysis are normally performed by a third party prior to the shipment of the coke either at the screening plant or the dock and the customer does not receive the results until after the shipment has left Indiana. They contend that this is to insure that the coke meets minimum qualifications. Payment for the coke is triggered by the terms of the agreement. Although the Taxpayer states that they pay the complete cost of the analysis, a purchase order obtained by the Department shows that the cost of the survey is usually split between the seller and buyer. Furthermore, the Taxpayer contends that the result of the analysis is sent to the Taxpayer who then forwards it to the customer and is done only when the quality of the coke is of importance to the buyer and the analysis is paid for by the Taxpayer. Yet, another purchase order states that if the chloride specification is not met, the order may be canceled, but, goes on to state that the cargo will not be rejected after shipment. If the customer does not receive the results until after shipment as argued by the Taxpayer, according to the purchase orders the customer would not be able to reject the coke because the shipment would be complete and title would have passed under IC 26-1-2-401.

The Taxpayer surmises that the auditor's position hinges on the fact the "risk of loss" may have passed on the docks in Indiana. They argue that in order for 45 IAC 1-1-119(2)(b) to apply, the buyer and seller must actually complete and finalize their entire sale in Indiana. Nevertheless, the Taxpayer has not shown that the transaction was not completed in Indiana. The Department takes the position that the sale was completed at the F.O.B. dock, which is in Indiana. Therefore, the sale is complete prior to being loaded. Gross income tax is applied at the point where a seller delivers goods to a buyer within Indiana for transportation outside the State, regardless of whether inspection, and possible rejection for nonconformity, takes place outside the State.

FINDING

The Taxpayer's protest is respectfully denied.

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